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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CLAYTON EUGENE DEFRIES; CLYDE E. DODSON; CLAUDE W. DAULLEY; R. F. SCHAMANN; KARL LANDGREBE; DONALD MASINGO,
Petitioners,

v.

LICENSED DIVISION, DISTRICT NO. 1— MEBA/NMU, AFL-CIO,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Firestone Tire & Rubber Co. v. *Bruch*, 489 U.S. 101 (1989), established the principle that there is to be no *de novo* judicial scrutiny of a determination regarding entitlement to ERISA benefits made by trustees of a plan which specifically confers discretion on the trustees with respect to such matters, and that any potential conflict of interest is merely a factor to be considered in applying the deferential abuse of discretion standard mandated by the common law of trusts.

This case presents the question—left open in *Bruch*—whether judicial scrutiny of ambiguous terms in the governing document of an ERISA benefit plan should be similarly deferential where that document expressly grants the trustees discretion in matters of interpretation, or whether the Court of Appeals correctly endorsed the District Court's *de novo* interpretation of the governing document on the ground that some of the trustees have a conflict of interest.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 943 F.2d 474, and is reprinted at pages 1-15 of the Appendix ("A."). The unreported opinion of the District Court is reprinted at A. 16-25.

JURISDICTION

The judgment of the Court of Appeals was entered on August 26, 1991. A. 2. On November 14, 1991, Chief Justice Rehnquist extended the time for filing this peti-

tion to and including December 9, 1991. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case arises from a dispute between a local union, the Licensed Division of District No. 1—MEBA/NMU ("the Licensed Division"), and its parent union, District No. 1—MEBA/NMU ("the District"), over which of them may appoint Union Trustees of the MEBA Benefit Plans and Trusts ("the Trusts") under the governing Agreements and Declarations of Trust ("Trust Agreements"). The Licensed Division's complaint below was grounded exclusively on the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001, *et seq.*, and alleged that petitioners, who were appointed by the District, were improperly continuing as Union Trustees in that the Licensed Division had purported to remove them and replace them with its own designees. The District Court's jurisdiction was asserted under 29 U.S.C. § 1132(e).

The Trusts are multiemployer benefit plans (*see* 29 U.S.C. § 186(c)) which provide pension, health and welfare and vacation benefits primarily to merchant seamen. At the time the complaint below was filed, the MEBA Pension Trust alone had over $1 billion in assets. The Trusts are governed by a Board of Trustees, consisting of six Union Trustees and six Trustees appointed by participating employers.

The Trust Agreements provide that the "Union" shall appoint and remove Union Trustees, and define "Union" as the "National Marine Engineers' Beneficial Association, AFL-CIO, D-1 Pacific Coast District, MEBA" ("D-1 PCD"). Pl. Ex. 6 at 3; *see* A. 4. This controversy arose because in March 1988, the National Maritime Union of America, AFL-CIO ("NMU") merged into D-1 PCD; the combined entity was then renamed "District No. 1—MEBA/NMU." Pursuant to the merger, the Dis-

trict created two subordinate local unions, the Licensed Division and the Unlicensed Division. Although D-1 PCD was renamed in the merger, there was no amendment of the Trust Agreements' reference to its pre-merger name in defining the "Union." [1]

In 1991, the Licensed Division elected new leadership, which asserted the right to control the selection of Union Trustees and initiated the present litigation in an effort to effectuate that claim.

PROCEEDINGS IN THE DISTRICT COURT

The District Court acknowledged that the ultimate issue presented was "the meaning of the term 'Union' within the MEBA Trust Plans." A. 20. As a threshold matter, defendants contended that the District Court should not interpret the Trust Agreements in the first instance, but should defer to the Trustees, who were scheduled to consider that issue within the week. Defendants relied on language of the Trust Agreements which expressly grants the Trustees "complete authority, in their sole and absolute discretion, to (i) interpret the terms of the Trust * * *. All such interpretations and determinations of the Trustees shall be final and binding upon all parties and persons affected thereby." A. 28. This language had been added to the Trust Agreements with the express intention "to grant discretionary authority to the Trustees with respect to plan interpretation and benefit determinations in accordance with the Supreme Court's 1989 decision in *Firestone Tire & Rubber Co.* v. *Bruch* [489 U.S. 101 (1989)]." *Id.* Defendants asserted that, pursuant to the *Bruch* decision, this grant of discretion to the Trustees required the District Court to await a decision by the Trustees and then to review that decision under an abuse of discretion standard.

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[1] The beneficiaries of the Trusts are not limited to members of the Licensed Division, but also include members of other unions within the MEBA family of unions. *See* A. 17.

The District Court acknowledged the general requirement for exhaustion of internal plan remedies, but held that it nonetheless could interpret the Trust Agreements *de novo* because the sitting Union Trustees' "inherent conflict of interest * * * provides an exception to the general rule that internal plan remedies be exhausted prior to coming to court." A. 22. The District Court's decision provided no explanation why this perceived conflict could not be accommodated by considering it "as a factor" in any subsequent judicial review of the Trustees' decision, as this Court suggested in *Bruch*. 489 U.S. at 115. Nor did it recognize that six Employer Trustees, with no "inherent conflict," would also participate in any interpretation of the Trust Agreements and that, by law, any deadlock would be resolved through binding arbitration. *See* 29 U.S.C. § 186(c)(5)(B). Accordingly, the District Court issued its own interpretation of the now ambiguous term "Union," finding that the new Licensed Division should be deemed to have become the "Union" in place of the parent District.

THE COURT OF APPEALS' OPINION

The Court of Appeals affirmed. It assumed without deciding that the exhaustion doctrine applied, but nonetheless found that exhaustion would be futile because, "in pursuing an administrative appeal, the Licensed Division would be asking the incumbent trustees to interpret themselves out of a job. We think that under the circumstances, futility is apparent and we so hold." A. 10. The Court of Appeals further justified judicial preemption of the Trustees' authority on the ground that even if the Trustees were permitted to interpret the Trust Agreements in the first instance, no judicial deference would be owed to their interpretation:

> Again laying aside the question whether the claim made here is one required to be first administratively presented to the trustees, we observe that were that

> done here and a ruling unfavorable to the Licensed Division were to result, *judicial review of the trustee's* [*sic*] *"interpretation" would be essentially the same as that we employ here, i.e., non-deferential.* Though *Bruch* directs deferential, abuse of discretion type review of trustee interpretations made under expressly conferred discretionary power, it also cautioned that where trustee conflict of interest is manifest, that should be factored into the judicial review process. 489 U.S. at 114-15. Here, given the palpable conflict of interest that would be involved, we believe our review of such a "discretionary" ruling would effectively be what we apply here [in the] first instance to the interpretive question—plenary review.

A. 10-11 n.* (emphasis added). Like the District Court, the Court of Appeals ignored the fact that six disinterested Employer Trustees would participate in any decision and that, in the event of a deadlock between Employer and Union Trustees, the issue would be decided by a neutral arbitrator.

Thus, the Court of Appeals held that judicial deference is not required on a matter of plan interpretation, notwithstanding an express grant of discretion, where one half of the Trustees operate under a perceived conflict of interest. On the merits, the Fourth Circuit endorsed the District Court's holding that the "Union" is now the Licensed Division.

REASONS FOR GRANTING THE WRIT

Prior to *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), the standard of judicial scrutiny in ERISA actions challenging benefit denials turned, in the opinion of many lower courts, on whether the plan trustees rendering the decision operated under a conflict of interest. The "orthodox" view was that decisions denying benefits could be reversed only if they were arbitrary and capricious. *See Van Boxel* v. *Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1049 (7th Cir. 1987), and cases cited therein. This view, however, came under increasing criticism, particularly where the plan trustees had a conflict of interest. *Id.* at 1049-51. *See also Jung* v. *FMC Corp.*, 755 F.2d 708, 711-12 (9th Cir. 1985); *Dennard* v. *Richards Group, Inc.*, 681 F.2d 306, 314 (5th Cir. 1982). This criticism

> culminated in the Third Circuit's * * * decision in *Bruch* v. *Firestone Tire & Rubber Co.*, 828 F.2d 134, 137-45 (3d Cir. 1987), which [held] that, whenever someone who is not a plan beneficiary is in a position to benefit from the rejection of a claim—the company, for example—no deference should be given the trustees' decision; the case should be treated as an ordinary contract dispute between the claimant and the trust. See *id.* at 145.

Van Boxel, 836 F.2d at 1049.

This Court's opinion in *Bruch* rejected the Third Circuit's reasoning. It held, in reliance on trust law principles, that the standard of judicial scrutiny of a benefit determination turns on whether the trustees are accorded discretion under the governing plan documents. If no discretion is accorded, review is *de novo*; where the trustees have discretion, review is under an abuse of discretion standard. 489 U.S. at 115. The presence or absence of a conflict is not determinative of the standard of review; rather, where "a benefit plan gives discretion

to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.' Restatement (Second) of Trusts § 187, Comment *d* (1959)." *Id.*

Bruch limited its delineation of the scope of judicial scrutiny to benefit determinations, leaving open the question whether the same principles would apply to other decisions of plan fiduciaries. This case raises the question left open in *Bruch*—whether deferential review of discretionary interpretations concerning non-benefit matters can be avoided by a finding that some of the trustees have a conflict of interest. We shall show (1) that the Fourth Circuit's affirmative answer to this question conflicts with the reasoning of *Bruch* and (2) that this question is an important one that should be settled by this Court because of the improper judicial embroilment in internal ERISA plan affairs and confusion that would result from perpetuation of the rule adopted below.

I. THE FOURTH CIRCUIT'S HOLDING CONFLICTS WITH THE REASONING OF *BRUCH*

While the holding of *Bruch* is limited to review of benefit decisions, its reasoning is not so circumscribed. The ultimate conclusion in *Bruch*—that review is *de novo* if the trustees have no discretionary authority, but is always deferential if they do—rests upon the principle that the language of ERISA and the legislative history of its "fiduciary responsibility provisions, 29 U.S.C. §§ 1101-1114, 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.'" *Bruch*, 489 U.S. at 110 (quoting H.R. Rep. No. 93-533 at 11 (1973), 1974 U.S. Code Cong. & Admin. News 4639, 4649).

Bruch thus reaffirms the teaching of *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 570 (1985), that "Congress

invoked the common law of trusts to define the general scope of [trustees'] authority and responsibility." [2] The fundamental principle on which *Bruch* rests is that, under ERISA, judicial scrutiny of a trustee interpretation of plan documents is the same as it would be in a common law action challenging the decision of a trustee.

General trust principles make no distinction between decisions involving benefits and other decisions involving trust interpretation. This is confirmed by the authorities relied on in *Bruch* to conclude that "[t]rust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers." 489 U.S. at 111.[3] It is also evident from *Bruch*'s reliance on this Court's statement in *Central Transport*, a non-benefit case, that the "trustees' determination that the trust documents authorize their access to records here in dispute has significant weight, for the trust agreement explicitly provides that 'any construction [of the agreement's provisions] adopted by the Trustees in good faith shall be binding upon the Union, Employees, and Employers.'" *Id.* (quoting 472 U.S. at 568). Accordingly, the reasoning of *Bruch* compels the conclusion that discretionary interpretations rendered by trustees in non-benefit cases are entitled to as much deference as are discretionary decisions in benefit cases.

The Fourth Circuit's approval of the District Court's *de novo* interpretation rests on the premise that deference to the Trustees' interpretation would be inappropriate

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[2] Moreover, the Court specifically has recognized "Congress' intent to cast [jointly-administered Taft-Hartley] employee benefit plans in traditional trust form." *N.L.R.B.* v. *Amax Coal Co.*, 453 U.S. 322, 331 (1981).

[3] *See* Restatement (Second) of Trusts § 187 (1959) ("Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion."), and other authorities cited in *Bruch*, 489 U.S. at 111.

because the Union Trustees have a "palpable conflict of interest."[4] A. 10 n.*. *Bruch*, however, expressly rejected any such distinction:

> Because we do not rest our decision on the concern for impartiality that guided the Court of Appeals, we need not distinguish between types of plans or focus on the motivations of plan administrators and fiduciaries. Thus, for purposes of actions under § 1132 (a)(1)(B) [absent a grant of discretion], the *de novo* standard of review applies regardless of whether the plan at issue is funded or unfunded and regardless of whether the administrator or fiduciary is operating under a possible or actual conflict of interest. Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a "facto[r] in determining whether there is an abuse of discretion." Restatement (Second) of Trusts § 187, Comment *d* (1959).

489 U.S. at 115 (citation omitted). The decision below plainly conflicts with *Bruch* if the rule of that case is applied also to non-benefit plan interpretations.

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[4] The Court of Appeals' conclusion that it would be futile to require exhaustion is merely another manifestation of its resistance to the rule announced in *Bruch*. Obviously, it is impossible to review the Trustees' decision under a deferential standard if the court refuses to await that decision. In any event, even if the Court of Appeals were correct that the Trustees' decision was foreordained and thus exhaustion was futile, that is not justification for applying a stricter standard of review. A reviewing court could easily ask whether the anticipated decision (*i.e.*, a decision in favor of the District) would constitute an abuse of discretion. Moreover, it was far from clear that the conflict posited by the Court of Appeals would have resulted in a ruling in favor of the District. The Union Trustees could have recused themselves, or the Employer Trustees could have voted in favor of the Licensed Division thereby creating a deadlock which would have been resolved by arbitration.

II. THE RULE ADOPTED BY THE FOURTH CIRCUIT'S DECISION WILL ENMESH THE FEDERAL COURTS UNNECESSARILY IN THE DAY-TO-DAY ADMINISTRATION OF ERISA PLANS AND WILL DISRUPT THE MANAGEMENT OF SUCH PLANS

Plan trustees commonly make plan interpretations under an arguable conflict of interest. For example, when a single-employer plan is terminated, any excess assets may revert to the sponsoring employer only if the plan so provides. 29 U.S.C. § 1344(d)(1)(C). In the typical case, the plan trustees will have been appointed and employed by the sponsoring employer and thus will face a conflict in interpreting the plan to determine whether it permits reversions. Under the Fourth Circuit's approach, participants could receive a *de novo* court interpretation on this question even where the trustees have discretion to interpret the plan.[5]

Similarly, multiemployer plan trustees often make interpretations as to which the union trustees, the employer trustees or both may have conflicting loyalties. As in *Central Transport*, the trustees must decide the extent of their power to audit participating employers to determine whether all required contributions have been made. The employer trustees could be expected to favor less expansive powers, while the union trustees arguably would have the opposite bias. Similarly, trustees are required to interpret complex contribution formulas to determine the level of employer contributions required.[6]

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[5] Plan termination is not an isolated occurrence. "From 1980 to 1986, over 1,220 plans with 1.4 million participants have been terminated with reversions to sponsoring employers totaling over $12 billion." Stephen R. Bruce, *Pension Claims: Rights and Obligations* 608 (1988).

[6] For example, the contribution formula in section 2.2(a) of the MEBA Pension Trust Agreement provides that:

> Each Employer shall pay to the Trustees for deposit in the Pension Trust, for each Employee represented by the Associa-

Many additional examples of conflict could be listed.[7]

In each of these instances a beneficiary, a participating employer or a participating union could challenge a decision (actual or anticipated) as in conflict with the plan documents. Under the Fourth Circuit's rationale, the courts would be free to decide each of these matters in the first instance. That result would burden judicial resources, and would make a mockery of *Bruch*'s invitation to plan sponsors to confer discretionary authority on plan trustees and thereby assure "a narrower standard of review." 489 U.S. at 115.

In addition, the Fourth Circuit's approach is certain to spawn, in non-benefit cases, the same type of confusion which existed in benefit cases prior to *Bruch*. *See supra*, pp. 6-7. If anything, this confusion would be even more detrimental to the efficient operation of pension and other benefit plans than was the confusion surrounding benefit cases. Trustees charged with management of these funds need the flexibility to manage without judicial preemption or second-guessing if they are to maximize income upon which the benefits of millions of workers depend. The law of trusts has long recognized that courts

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tion for the purpose of collective bargaining, such sum per day per man on Employer payroll or such percentage of such Employee's straight time earnings plus the non-watchstanding equivalent, without regard to whether such equivalent is actually paid as shall be determined pursuant to section 2.2(b)-(c) below or otherwise as shall be determined necessary to qualify the Plan and Pension Trust under then existing laws and regulations.

Pl. Ex. 6. Sections 2.2(b) and 2.2(c) of the MEBA Pension Trust Agreement contain equally complex formulas. *Id.*

[7] Under the MEBA Trust Agreements and many other plans, Trustees must interpret the plan documents to determine whether certain investments are permitted, whether employers are delinquent and, if so, whether collection efforts should be undertaken, and whether benefit and/or contribution levels should be raised or lowered.

should not interfere with discretionary decisions of trustees except when they amount to an abuse of discretion or a violation of fiduciary duty. Similar rules of judicial restraint have been adopted in other contexts to preserve the prerogatives of private parties. For example, "[t]he business judgment rule exists to protect and promote the full and free exercise of the managerial power * * *." *Smith* v. *Van Gorkom*, 488 A.2d 858, 872 (Del. 1985). And it is "the general congressional policy to allow unions great latitude in resolving their own internal controversies." *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964). Thus, a court may not "invalidate [a union's] interpretation of its own constitution unless it is 'patently unreasonable.'" *Newell* v. *International Bhd. of Elec. Workers*, 789 F.2d 1186, 1189 (5th Cir. 1986).

Under the rule adopted by the Court of Appeals, the discretionary decisions of ERISA fiduciaries would be subject to unwarranted judicial intrusion. To avoid such consequences, this Court should adopt a clear rule protecting trustee discretion to render administrative interpretations, corresponding to that adopted in *Bruch* for benefit interpretations.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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December 9, 1991

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-2033

LICENSED DIVISION DISTRICT NO. 1
MEBA/NMU, AFL-CIO,
Plaintiff-Appellee,

v.

CLAYTON EUGENE DEFRIES; CLYDE E. DODSON;
CLAUDE W. DAULLEY; R. F. SCHAMANN;
KARL LANDGREBE; DONALD MASINGO,
Defendants-Appellants.

No. 91-2056

LICENSED DIVISION DISTRICT NO. 1
MEBA/NMU, AFL-CIO,
Plaintiff-Appellee,

v.

CLAYTON EUGENE DEFRIES; CLYDE E. DODSON;
CLAUDE W. DAULLEY; R. F. SCHAMANN;
KARL LANDGREBE; DONALD MASINGO,
Defendants-Appellants.

Appeals from the United States District Court
for the District of Maryland, at Baltimore
William M. Nickerson, District Judge
(CA-91-310-WN)

Argued: May 8, 1991

Decided: August 26, 1991

Before PHILLIPS and WILKINS, Circuit Judges, and HALLANAN, United States District Judge for the Southern District of West Virginia, sitting by designation.

Affirmed by published opinion. Judge Phillips wrote the opinion, in which Judge Wilkins and Judge Hallanan joined.

COUNSEL

ARGUED: Robert J. Higgins, Dickstein, Shapiro & Morin, Washington, D.C., for Appellants. Susan Souder, Gordon, Feinblatt, Rothman, Hoffberger & Hollander, Baltimore, Maryland, for Appellee.

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OPINION

PHILLIPS, Circuit Judge:

The Licensed Division of District No. 1 of the Marine Engineers' Benefits Association/National Maritime Union (Licensed Division), filed suit seeking a declaratory judgment that the Licensed Division, and not its "parent

union," District No. 1—MEBA/NMU (District No. 1), had authority to appoint the union trustees of benefit plans of recently merged unions. The Licensed Division sought the ruling after it had tried to remove the six defendants-appellants as the union trustees, but the defendants had refused to vacate their offices. The district court found that under the applicable agreements, the Licensed Division has appointment authority. We agree, and affirm.

I

The controversy giving rise to this action arose because of a merger in March 1988 between District No. 1—Pacific Coast District (PCD), which was composed mostly of supervisory maritime officers, and the National Maritime Union (NMU), which was composed of non-supervisory maritime workers. The new union was called "District No. 1—MEBA/NMU." As part of the structuring of the new union, and to accommodate potential problems with having supervisory and non-supervisory employees in the same bargaining unit, *see generally* 29 U.S.C. § 164(a), two divisions were created: the Licensed Division, which includes supervisory maritime personnel licensed by the Coast Guard and consists of all the former employees of PCD; and the Unlicensed Division, which includes all other members and consists of all members of NMU. At the time of the merger, defendants, who hold offices in the MEBA/NMU, placed themselves in control of the Licensed Division, and appointed themselves as trustees of the benefits plan.

The merger of the unions was approved by a vote of the membership of both unions, and the merger agreement included changes to the relevant union constitutional provisions. However, no amendment was made to the trust agreements that govern administration of the employer-employee controlled trusts for pension and medical benefits, vacation benefits, and training. (Pursuant to 29 U.S.C. § 186(c)(5)(B), employees and employers

appoint equal members to control these multi-employer, multi-union plans.) Those trust agreements provide that "the Union" should appoint the trustees, but the antecedent to "the Union" in the agreements, District No. 1—Pacific Coast Division, no longer exists. This raised the question that prompted this litigation: what, under the relevant documents, is now "the Union"? It is a question that requires answer because in new elections the defendants were all defeated as the leaders of the Licensed Division. The new leadership wanted to appoint the trustees, but the old leadership, who remain officers of the District No. 1 union, resisted.

The district court, after a trial, held that the Licensed Division is "the Union." This timely appeal by the defendant-trustees followed.

II

An initial question is whether the district court had jurisdiction to entertain an action by the Licensed Division, which is the only named plaintiff. On the challenge of subject matter jurisdiction, the district court held that though the Licensed Division did not have standing as a "fiduciary" or "participant" to bring this action under 29 U.S.C. § 1132 of ERISA (authorizing suits by a "participant, beneficiary, or fiduciary"), the officers of the division would have. Building on this, the court held that though the plaintiff "may not have fully stated the correct federal statutory provision under which the claim arises [plaintiff relied on ERISA § 1132] or fully stated the correct plaintiff(s)," such failure does not warrant dismissal, since "[i]t is well settled that courts may excuse pleading defects if the facts alleged in the complaint and relief requested demonstrate the existence of a substantial federal question."

We agree that in an appropriate situation a court may excuse pleading defects for the purpose here in issue. In *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d

985 (4th Cir. 1990), for example, we held that though a plan administrator did not have standing to sue under § 1132, it could be deemed to have invoked general federal question jurisdiction under 28 U.S.C. § 1331, even though the claim as pleaded never invoked that statute as its jurisdictional basis. In that case, faced with a claim "central" to ERISA yet one that fell "in the interstices of this comprehensive and labyrinthine statute[,]" we held that the "pleading defect" of not invoking the right statutory provision could be overlooked when "the facts alleged in the complaint and the relief requested demonstrate the existence of a substantial federal question." 906 F.2d at 988. Lack of standing, however, is not a "pleading defect" that can be excused by such a taking of judicial notice. Though such a defect might be cured by timely amendment, *see generally* Fed. R. Civ. P. 15; 6 C. Wright, A. Miller, M. Kane, *Federal Practice & Procedure: Civil 2d* § 1474 (1990), and was attempted here, the curing amendments were offered belatedly (post-judgment), and were rightly rejected.

Consequently, jurisdiction in this case can only be grounded in a determination that the Licensed Division, as sole named plaintiff, has standing under ERISA § 1132 to maintain this action, or that it may bring this action as one asserting a claim "central to ERISA," hence cognizable as one implicitly invoking the general federal question jurisdiction of § 1331 under the reasoning of *Provident Life*. Though we think that subject matter jurisdiction might be upheld on either basis, we conclude that it is properly rested here on the basis that the Licensed Division has standing as a "fiduciary" to invoke the jurisdiction conferred by ERISA § 1132.

The Licensed Division's contention, not accepted by the district court, that it had standing to sue as a "fiduciary" under § 1132 boils down to this. Section 1132(a)(3) provides that a civil suit may be brought "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the

terms of the plan . . . ." In turn, "fiduciary" is defined thusly: "A person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan . . . , or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). The Licensed Division is a fiduciary "to the extent" that it exercises "discretionary authority or discretionary control in the administration of a plan." Removing and replacing trustees is a manifestation of such an exercise of discretionary authority in the administration of the plan. Therefore, "to the extent" the Licensed Division has authority to appoint trustees (concededly the issue on the merits of the case) it is a fiduciary.

Appellants challenge this assertion on two levels. First, they contend, on a semantic level, that a union appointing trustees cannot exercise "authority or control" respecting the administration of a plan since by law, *id.* § 186(c)(5)(B), the union only can appoint one-half of a plan's trustees, and a majority of trustees is needed for the plan to act. Hence, appellants say fifty percent is not "control or authority." This argument is unavailing because it depends on an unduly restrictive interpretation of "control or authority." The statute defines fiduciary as a person who "exercises *any* discretionary authority" over the management of a plan. In common usage "authority" includes "power to influence or command thought, opinion, or behavior." *Webster's Ninth New Collegiate Dictionary* 117 (1987). Appointing one-half of a governing board reflects a "power to influence" the behavior of an enterprise. That is all that is required to satisfy the statutory definition.

The second challenge is similarly unavailing. It relies on cases that have emphasized the strict limiting effect on the definition of "fiduciary" that is imposed by the qualifying phrase "to the extent." As the Fifth Circuit has noted, "[t]he phrase 'to the extent' indicates that a

person is a fiduciary only with respect to those aspects of the plan over which he exercises authority or control." *Sommers Drug Store v. Corrigan Enters., Inc.*, 793 F.2d 1456, 1459-60 (5th Cir. 1986). On this basis, a number of courts have held that a union does not have standing under § 1132 simply to sue for pension benefits on behalf of its members since in such a representative role it is not acting as a fiduciary. *See, e.g., Forys v. United Food & Commercial Workers Int'l Union*, 829 F.2d 603, 607 (7th Cir. 1987) (union is not a fiduciary when it "performs *solely* the task of presenting the claims of its individual members to the fund"); *New Jersey State AFL-CIO v. State of New Jersey*, 747 F.2d 891, 892-93 (2d Cir. 1984) (union has no standing to bring an ERISA action to clarify the rights of its members to future benefits); *United Food & Commercial Workers Local 204 v. Harris-Teeter Super Markets, Inc.*, 716 F. Supp. 1551, 1561 (W.D.N.C. 1989) (union challenging employer's decision to deny an employee plan participation does not have standing under ERISA § 1132)

But the action brought here is not brought in any such representational capacity; rather it is brought directly by the Licensed Division to assert a claim of authority to appoint plan trustees. And, as we already have concluded, a union exercises the discretionary authority of a fiduciary when it appoints trustees. Consequently, we hold that a union claiming such authority has standing to sue as a fiduciary "to the extent" that it challenges, as violative of ERISA or the terms of the plan, any act or practice which pertains to the appointing and replacing of trustees. Other courts are in accord. *See Leigh v. Engle*, 727 F.2d 113 (7th Cir. 1984); *Moehle v. NL Indus., Inc.*, 646 F. Supp. 769 (E.D. Mo. 1986). And we think this view comports with the legislative history of ERISA: "Under this definition, fiduciaries include officers and directors of a plan, members of a plan's investment committee and *persons who select these individuals.*" H.R. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5103 (emphasis supplied).

Accordingly, we hold that the Licensed Division has standing to bring this action under ERISA § 1132.

III

Before reaching the core merits issue, we have a question whether the district court erred when it interpreted the terms of the trust agreements without first awaiting (or requiring) the Licensed Division to seek from the incumbent trustees an interpretation of the agreements and a decision as to whether the Licensed Division or District No. 1 was "the Union." The court essentially concluded that any exhaustion requirement that might exist should be held inapplicable here because requiring appeal to the incumbent trustees, asking them to interpret the agreement, would have been futile. Assuming that exhaustion of a claim such as that here made is required under any circumstances, we agree that it should not in any event apply here because of its futility.

Forced to decide the question, we might well hold that the general exhaustion requirement applied to ERISA claims does not apply to the claim here in issue. As we recently noted in *Makar v. Health Care Corp.*,

> ERISA does not contain an explicit exhaustion provision. Nonetheless, an ERISA *claimant* generally is required to exhaust the remedies provided by the employee benefit plan in which he participates as a prerequisite to an ERISA action for denial of benefits under 29 U.S.C. § 1132. . . .
>
> . . . Congress' apparent intent in mandating these internal claims procedures was to minimize the number of frivolous ERISA lawsuits; promote the consistent treatment of *benefit claims*; provide a non-adversarial dispute resolution process; and decrease the costs and time of *claims settlement.*

872 F.2d 80, 82-83 (4th Cir. 1989) (emphasis supplied) (citations omitted). The instant case does not involve a

benefit claim, however; instead it goes to the fundamental administration of a plan. Consequently, this case is distinguishable from suits involving claims, in which the intent of Congress that exhaustion occur is plain. This distinction is borne out by the conclusion in *Makar*: "In short, Congress intended plan fiduciaries, not the federal courts, to have primary responsibility for *claims processing*." *Id.* at 83 (emphasis supplied). The same interests are not at stake, and the same congressional intent is not evident, when the dispute does not involve claims processing but the fundamental administration of a plan.

It is undisputed that the administrative appeals procedure ERISA requires in every plan does not apply to non-benefit challenges. *See* 29 U.S.C. § 1133 ("every employee benefit plan shall . . . afford a reasonable opportunity to any participant whose *claim for benefits* has been denied for a full and fair review") (emphasis supplied). Yet it is this statutory requirement upon which the judicially-created exhaustion requirement is grounded. *See Makar*, 872 F.2d at 83. It follows, therefore, that if there is no statutory requirement for an appeals procedure respecting claims not involving benefits, the logic of the exhaustion requirement no longer applies. That this particular plan had no procedures for appeals of non-benefit issues is further evidence that the appeals procedure required by ERISA § 1133 has no application to non-benefit challenges. As the Second Circuit concluded, "although common law may have required a prior demand before bringing an action [challenging administration of a plan], Congress did not incorporate that doctrine into the ERISA statute." *Katsaros v. Cody*, 744 F.2d 270, 280 (2d Cir. 1984). *Accord Simmons v. Willcox*, 911 F.2d 1077, 1081 (5th Cir. 1990) (employee could not avoid exhaustion requirement by simply recharacterizing her claim for benefits as one for breach of fiduciary duty).

Because the exhaustion question is, however, a fundamental one with wide implications that need not be

decided here, we decline to do so, and hold, in agreement with the district court, that if the exhaustion requirement did apply to claims such as those here in issue, it should not be enforced here because of its obvious futility. The Licensed Division, under newly elected leadership which had ousted the officers who now fill the union trustee positions, seeks a ruling that it has the authority to remove the incumbent trustees and appoint new ones. Therefore, in pursuing an administrative appeal, the Licensed Division would be asking the incumbent trustees to interpret themselves out of a job. We think that under the circumstances, futility is apparent and we so hold. *See Makar*, 872 F.2d at 83 (discussing but rejecting claim of futility); *Amato v. Bernard*, 618 F.2d 559, 568 (9th Cir. 1980) (recognizing that "despite the usual applicability of the exhaustion requirement" of ERISA, such a requirement should be waived when resort to the administrative route is futile or the remedy inadequate). *Cf. Fizer v. Safeway Stores, Inc.*, 586 F.2d 182, 183 (10th Cir. 1978) ("clear and positive showing of futility" required to suspend the exhaustion requirement under the LMRA).*

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* The appellants complain that if exhaustion is not required, the Licensed Division will have been enabled to circumvent the provisions of the trust agreements that the trustees "shall have complete authority, in their sole and absolute discretion" to interpret the terms of the trust and the plan with final and binding effect, and the principles of deferential review of such interpretations laid down in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Again laying aside the question whether the claim made here is one required to be first administratively presented to the trustees, we observe that were that done here and a ruling unfavorable to the Licensed Division were to result, judicial review of the trustee's "interpretation" would be essentially the same as that we employ here, i.e., non-deferential. Though *Bruch* directs deferential, abuse of discretion type review of trustee interpretations made under expressly conferred discretionary power, it also cautioned that where trustee conflict of interest is manifest, that should be factored into the judicial review process. 489 U.S. at 114-15. Here, given the palpable conflict of interest that would be involved, we

IV

This brings us finally to the merits of the appeal: whether the reference to "the Union" in the trust agreements confers on the Licensed Division, and not the "parent union," District No. 1—MEBA/NMU, the power to appoint trustees. Though we review this legal question *de novo*, we accept as not clearly erroneous the trial court's "finding of fact" that in this context the "trusts are an integral part of collective bargaining."

We confront the question of what is "the Union" because the trust agreements, which were not amended during the merger process, provide that "the Union" shall appoint trustees, and the antecedent to "the Union" in the agreements is District No. 1—Pacific Coast Division, which was abolished in the merger. Consequently, we must look to the documents effectuating the merger to determine which organization must be deemed to have assumed, for the purpose of appointing trustees, the mantle of "the Union."

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believe our review of such a "discretionary" ruling would effectively be what we apply here first instance to the interpretive question—plenary review.

We also note on this point the interesting counter-argument of the Licensed Division that what is involved here is not contract "interpretation" at all (so as arguably to be a matter for the trustees in the first instance) but contract "construction" (which is another process not expressly given to the trustees). The distinction, one powerfully made by Professor Corbin, is between "interpreting" the meaning of contractual text, and "construing" what the contracting parties would have intended had they anticipated something that they did not and so did not speak to at all in any contractual text. *See* 3 *Corbin on Contracts* § 534 (1960). The latter, says the Licensed Division, is what is involved here, and that process, as distinguished from "interpretation," is nowhere committed to the trustees. In view of our disposition, we need not address that possibility beyond noting its close kinship to the question whether exhaustion of this fundamental non-benefit type claim is in any event subject to any exhaustion requirement found implicit in ERISA.

The Agreement of Merger, the pact which the membership voted on to combine the unions, provides:

> The administration of all collective bargaining agreements held by District No. 1—PCD, MEBA, . . . shall become the responsibility of and will be performed by the Licensed Division.

This delegation of authority was augmented by a provision in the new District No. 1—MEBA/NMU Constitution, also approved by the membership, which states:

> The principal function of each Division shall be, in addition to such other powers and duties which it may exercise under and pursuant to the District Constitution, the adoption of policies in the matter of contract enforcement, and the negotiation, execution, enforcement, and administration of all collective bargaining agreements covering the Division . . . . The negotiation and administration of all collective bargaining agreements covering licensed officers shall be the exclusive responsibility of the Licensed Division . . . .

Based on this, the district court concluded that the Licensed Division has the authority to appoint trustees, since administration of the trusts is part of "administration of all collective bargaining agreements." We agree. We find this construction of the merger documents supported by a fair reading of the documents considered as a whole. A contrary conclusion would place persons not affiliated with the Licensed Division in the power to appoint trustees who would oversee a trust in which nine out of ten of the participants are current or retired members of the Licensed Division.

Appellants attack this conclusion on several fronts, but all their challenges fail. First, they contend that the premise that trusts are an integral and inseparable part of collective bargaining is contrary to law. For support they cite *NLRB v. Amax Coal Co.*, 453 U.S. 332 (1981), in which

the Court held that a union can pressure an employer to join a multi-employer trust fund without violating NLRA § 8(b)(1)(B), which prohibits a union from coercing an employer in the selection of a bargaining representative, since the Court found trustees of trust funds are *not* "representatives for the purposes of collective bargaining . . . ." *Id.* at 334. In that context, the Court held that "[t]he atmosphere in which employee benefit trust fund fiduciaries must operate . . . is wholly inconsistent with [the collective bargaining] process of compromise and economic pressure." *Id.* at 336. But significantly the Court went on to say that "the trustees operate under a detailed written agreement, . . . which is itself the product of bargaining between the representatives of the employees and those of the employer." *Id.* (footnote omitted).

This indicates that the *Amax Coal* Court saw trust agreements as a *product* of collective bargaining agreements. The Court's ultimate holding was based on its conclusion that trustees are not the agent of the appointing power (in that case the employer), since they are bound by the law of trusts which Congress incorporated into ERISA. *See id.* at 332-34. But this holding does not conflict with our decision here. Trusts are an integral part of collective bargaining *because* they are a product of that process. Simply because the duties of a trustee, once appointed, are carried out in an atmosphere quite different from the collective bargaining process does not negate the fact that the trust agreements are part of the collective bargaining process. We find the conclusion that trustees are not representatives for collective bargaining purposes wholly consistent with the conclusion that trusts are part of (or a product of) the collective bargaining process. These conclusions are compatible, and hence the appellants' contention fails.

Second appellants contend that the "plain language" of the Agreement of Merger dictates only one result, that

"the Union" is the District No. 1 and not the Licensed Division. The Agreement of Merger states:

> The National Maritime Union . . . agrees to merge *into* District No. 1—Pacific Coast District, of the [NMEBA], which shall thereafter change its name to District No. 1—MEBA/NMU of the [NMEBA].

Appellants place great reliance on this language to argue that the NMU was being merged *into* the PCD, which in the trust agreement is without question the "Union," and that the PCD—"the Union"—should change its name to District No. 1. Hence, they contend that "the Union" must be the successor entity with the new name, District No. 1, and not the Licensed Division.

This argument holds some persuasive force. The problem, however, is that there are other provisions inconsistent with this language. Paragraph 3(d) of the Agreement of Merger provides:

> The administration of all collective bargaining agreements held by District No. 1—PCD, MEBA, and the dispatching of jobs under its Shipping Rules, shall become the responsibility of and will be performed by the Licensed Division.

And, as indicated, the district court found as fact that the trusts here are part of collective bargaining. Hence, this provision directly conflicts with the "merged into" provision since it indicates that the administration of the trusts (meaning the appointment of the trustees) is expressly delegated to the Licensed Division.

Appellants respond that the Agreement of Merger also provides that all the "assets and liabilities" of the pre-merger unions will be "combined and integrated . . . [and] held in the name of District No. 1—MEBA/NMU." It contends that the trust agreement is an "asset," and that "ownership" of the asset gives it the right to appoint the trustees. This contention also fails, since trust plans are decidely *not* "assets" of unions, but instead are

"owned" and "exist" for the benefit of the trust's participants and beneficiaries. *See Tuvia Convalescent Center v. National Union of Hosp. & Health Care Employees*, 717 F.2d 726 (2d Cir. 1983).

Appellants finally assert that this holding misreads the Agreement of Merger because it failed to consider the national MEBA constitution. Article 8, § 6 provides that "[e]ach District shall . . . have the authority . . . to designate the Union Trustees for any . . . Plan or Fund established pursuant to any such collective bargaining agreement." Appellants contend that since part of the merger vote included acceptance of the national constitution, then it should settle the question. However, we agree with the trial court that article 8 of the national constitution "does not control because . . . the separate Divisions are neither recognized nor accounted for by the NMEBA in its Constitution." Consequently, this provision in the constitution is inapplicable and not inconsistent with our holding.

V

In conclusion, the judgment of the district court concluding that the Licensed Division has authority to appoint trustees, is affirmed.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WN-91-310

LICENSED DIVISION, DISTRICT NO. 1-MEBA/NMU, AFL-CIO

v.

CLAYTON E. DEFRIES, *et al.*

MEMORANDUM

The above captioned case came before this Court on February 4, 1991, for a hearing on the merits. Upon a review of the testimony, argument, and exhibits, this Court finds that Plaintiff's request for a declaratory judgment shall be granted.

BACKGROUND

The parties in this suit are all members in good standing of the National Marine Engineer's Beneficial Association ("NMEBA"). The parties are also participants in the MEBA Trusts as described below. The NMEBA is divided into three districts, one of which is District No. 1-MEBA/NMU. District No. 1 came into existence in 1988 when the National Maritime Union ("NMU") merged into District No. 1-Pacific Coast District ("PCD") of the NMEBA. This new entity then changed its name to District No. 1-MEBA/NMU of the NMEBA. The new District No. 1 was divided into two divisions, the members of the NMU becoming members of the Un-

licensed Division and the members of the District No. 1-PCD becoming members of the Licensed Division.[1] In the merger agreement, Defendants (not including Defendant Masingo) named themselves the Licensed Division Council as described in the District No. 1-MEBA/NMU Constitution.

Each Division has benefit plans for its members which are maintained separate and independent from the union. The Licensed Division has four trusts which are at issue in this suit: the MEBA Pension Plan Trust, the Welfare Plan Trust, the Vacation Plan Trust, and the Training Plan Trust (the "MEBA Trusts"). The plans of each Division have not been merged, although it appears to be under consideration by District authorities. About 90 percent of the MEBA Trust participants are from the Licensed Division. The MEBA Trusts are a jointly-administered trust fund with twelve trustees. Six trustees are appointed by the employers with whom collective bargaining agreements are made (Employer Trustees), and six are appointed by the union (Association Trustees). The Defendants who comprised the Licensed Division Council appointed themselves and Donald Masingo as the Association Trustees over the MEBA Trusts.

In late 1990 elections were held within the Licensed Division for the positions of Licensed Division Council, Branch Agents, and Patrolmen. The Defendants who comprised the Council were defeated and Plaintiffs Gordon Ward, Joel Bem, Alexander Shandrowsky, Mark Austin, and Nick Hadju were elected as the officers of the Licensed Division Council, taking office on January 1, 1991. The Council adopted LDC1-91 on January 25, 1991, which removed all Association Trustees, including Defendants, from all four MEBA Trusts and appointed in their place Gordon Ward, Joel Bem, Mark Austin, Nicholas

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[1] Basically, the Licensed Division consists of supervisory employees and the Unlicensed Division consists of supervised employees.

Hadju, Alexander Shandrowsky, William Langley, and as an alternate, Steven Smith.

This dispute between the parties in this case concerns who has the authority under the MEBA Trust Plans to appoint the Association Trustees over those trusts. Plaintiff, through its Licensed Division Council, claims that it has the authority. Defendants, as officers of District No. 1-MEBA/NMU, claim they have the authority. All parties point to the National and District Constitutions, applicable By-Laws, and the terms of the Trust Plans as support for their position.

The MEBA Trust Plans provide in paragraph 3.4 that "[t]he appointment of Association Trustees . . . shall be made by the Union." Paragraph 3.6 provides that ". . . Association Trustees . . . may be removed and replaced at will in accordance with section 3.4." "Association" is defined in paragraph 1.3 as the "[NMEBA], AFL-CIO, and its affiliates, including the Union." In paragraph 1.4 "Union" is defined as the "[NMEBA], AFL-CIO, D-1 Pacific Coast District, MEBA." The difficulty here is that the D-1 Pacific Coast District no longer exists and the applicable sections of these plans have not been amended since 1987, prior to the merger of NMU with District No. 1-PCD.

This case originally came before this Court on February 4, 1991, pursuant to Plaintiff's Motion for Temporary Restraining Order requesting an injunction to temporarily restrain Defendants from representing themselves as, and/or taking any action as, the Association Trustees of the MEBA Trusts because of their removal as of January 25, 1991. Counsel for Defendants filed an opposition on February 4. The meetings of the MEBA Trusts were scheduled for February 4-6, 1991, in Orlando, Florida. Plaintiff avers that Defendants refuse to acknowledge their removal as Association Trustees. Plaintiff also avers that Defendants intend to prevent the newly appointed successor Association Trustees from as-

suming their positions and that armed guards will be present to insure it. Plaintiff further avers it was "kept in the dark" as to the location and agenda of the Trustees meeting.

After some argument on the Temporary Restraining Order, this Court presented the option to the parties of proceeding on the merits of the underlying declaratory judgment action and resolving all of the pending issues. Defendants represented to the Court that the binding decisions of the Trustees, including an interpretive decision as to the meaning of the word "Union" in the Trust Plans, would not be made until Wednesday, February 6. Defendants took the position that going forward on the merits was not intended as a waiver of their view that the Trustees are the entity empowered to interpret and define "Union." The Court took a one and one-half hour luncheon recess to allow the parties to consider the option of tabling the TRO proceeding and going forward on the merits of the declaratory judgment complaint.

Following the recess the parties indicated their preference to proceed on the merits. Testimony and argument was concluded on the afternoon of February 4 with the parties essentially agreeing that the documents, the constitutions, by-laws, and trust plans, controlled. Plaintiff put on testimony to clarify the structure and interpretation from the vantage point of the newly elected Licensed Division Council. Defendants put on testimony concerning the intent behind the drafting of the merger agreement and District Constitution. On February 5, supplemental evidence in correspondence form was delivered to this Court, including a copy of the National Constitution of the NMEBA. Upon consideration of the testimony, exhibits, and argument this Court concludes that a declaratory judgment on the merits shall be issued in Plaintiff's favor. Counsel were notified by telephone of this Court's decision on the afternoon of February 5, and were advised that a written memorandum and order would follow.

DISCUSSION

The issue to be resolved in this case is the meaning of the term "Union" within the MEBA Trust Plans because it is the "Union" which is given the authority to appoint and remove the six Association Trustees of the Trust Plans. As stated earlier, "Union" is defined in the Trust Plans as the District No. 1—Pacific Coast District, no longer an existing entity. Both sides cite various sections of union constitutions, by-laws, and the merger agreement to shed light on the meaning of "Union" in the Trust Plans.

While the documents in question leave much to be desired in terms of clarity regarding the appointment of Association Trustees to administer and carry out the necessary fiduciary obligations associated with the various agreements and Trust Plans, the documents and related evidence before this Court lead to the conclusion that the recently elected officers of the Licensed Division constituting the Licensed Division Council did lawfully, in accord with the governing authority vested in them, appoint the individuals named in the resolution of that body dated January 25, 1991 (Ptf. Exh. 2), as Association Trustees of the four specified plans. This Court finds that "Union", within the meaning of the currently in-force MEBA Trust documents, should be interpreted to mean the Licensed Division.

First, this Court finds as fact, as argued by Plaintiff's counsel, that the trusts are an integral and inseparable part of collective bargaining. The amount of contributions to the Trust Plans are negotiated and contracted as part of the terms of the collective bargaining agreements. The Agreement of Merger, paragraph 3(d), provides that:

> The administration of all collective bargaining agreements held by District No. 1—PCD, MEBA, and the dispatching of jobs under its Shipping Rules, shall become the responsibility of and will be performed by the Licensed Division.

This agreement, consisting of a delegation of authority in collective bargaining, was fulfilled in the District No. 1-MEBA/NMU Constitution, Article Two, section 2, which states:

> [t]his District, through its Divisions, shall be the exclusive representative for each and all of its members for the purpose of collective bargaining . . . and for the negotiation and execution of contracts."

The delegation was further described in Article Four, section 5:

> The principal function of each Division shall be, in addition to such other powers and duties which it may exercise under and pursuant to the District Constitution, the adoption of policies in the matter of contract enforcement, and the negotiation, execution, enforcement, and administration of all collective bargaining agreements covering the Division or any portion thereof. The negotiation and administration of all collective bargaining agreements covering licensed officers shall be the exclusive responsibility of the Licensed Division . . . .

No exception in the above administrative authority is noted in the merger agreement or elsewhere to the inclusion of oversight and appointment/removal of Association Trustees of the plans or funds at issue.

Second, this Court concludes that administration of the plans by Association Trustees appointed from within the ranks of the Licensed Division was intended since any other interpretation would allow fiduciary administration by persons who, although members of the District No. 1-MEBA/NMU, may not be members of the Licensed Division and who may have personal interests in conflict with such members. Prior to the merger, the MEBA Trusts Plans were for the benefit and use of the members of District No. 1—PCD, the entity negotiating the collective bargaining agreements with terms requiring plan con-

tributions. Subsequent to the merger, the plans are still for the primary benefit of the Licensed Division members, formerly District No. 1-PCD.

Defendants argue that the District should have the power to appoint Association Trustees in light of Article Eight, section 6, of the NMEBA Constitution which states: "[e]ach District shall . . . have the authority . . . to designate the Union Trustees for any Pension, Welfare, Vacation, or Training Plan or Fund established pursuant to any such collective bargaining agreement." The NMEBA Constitution does not control because, as Plaintiff points out, the separate Divisions are neither recognized nor accounted for by the NMEBA in its Constitution. Defendants' also argue that the Trust Plans are assets, interests, or property belonging to the District. See Article Eight, District Constitution. This argument does not overcome the above stated interests of the Licensed Division because in the same Article the collective bargaining agreements also belong to the District, even though the Divisions have full authority to negotiate, execute, enforce, and administer them.

Defendants' argument that this action is premature because of failure to exhaust internal procedures likewise does not avail. For Defendants to decide whether they, as District officers, have the right to appoint or remove themselves as Association Trustees is an inherent conflict of interest and provides an exception to the general rule that internal plan remedies be exhausted prior to coming to court. This Court also notes that irreparable harm to the plans could result if Defendants were unlawfully seated as Association Trustees.

Defendants argue in their opposition memorandum that this Court lacks subject matter jurisdiction because Plaintiff does not have standing to sue under ERISA. This argument does not succeed. ERISA specifies that only a participant, beneficiary, fiduciary or the Secretary may sue to enforce the provisions of ERISA or the terms of

a plan. 29 U.S.C. § 1132(a). As Defendants point out, a labor organization is not a participant, beneficiary or fiduciary within the meaning of ERISA. See 29 U.S.C. § 1002(7), (8) and (21); *District 65 v. Harper & Row*, 576 F.Supp. 1468 (S.D.N.Y. 1983) Trustees, however, as this Court has declared Messrs. Ward, Bem, Shandrowsky, Austin, Hadju, Langley, and Smith to be, are fiduciaries both under ERISA (29 U.S.C. § 1002(21)) and by declaration of the Trust Plans. (See Pension Plan, Art. IV, Sec. 4.7(1); Welfare Plan, Art. IV, Sec. 4.6(k); Training Plan, Art. IV, Sec. 4.6(k); and Vacation Plan, Art. IV, Sec. 4.6(k)). The Trust Plans also give the Trustees the authority to sue in court:

> 7.2 The Trustees may seek judicial protection by any action or proceeding they may deem necessary to settle their accounts, or to obtain a judicial determination or declaratory judgment as to any question or construction of the Agreement and Declaration of Trust or instruction as to any action thereunder.

See Trust Plans, Art. VII, Sec. 7.2. The fact that Plaintiff may not have fully stated the correct federal statutory provision under which the claim arises or fully stated the correct plaintiff(s) does not warrant dismissal for lack of subject matter jurisdiction. It is well settled that courts may excuse pleading defects if the facts alleged in the complaint and relief requested demonstrate the existence of a substantial federal question. *Provident Life v. Waller*, 906 F.2d 985, 988 (4th Cir. 1990), citing *Schlesinger v. Councilman*, 420 U.S. 738, 744 n.9, 95 S.Ct. 1300, 1306 n.9 (1975); see also *Blue v Craig*, 505 F.2d 830, 844 (4th Cir. 1974). This Court finds that Plaintiff's complaint meets this test and demonstrates that a federal question is involved.

Defendants also argue that this Court does not have personal jurisdiction over them. This argument does not succeed. Defendants have been sued in their official capacity as Trustees of the MEBA Trusts who are purport-

ing to still have authority to transact business as Trustees. The fact that some of the Defendants do not live in Maryland or visit here is irrelevant. The Trust Plans state that the "Agreement and the Trust created hereby shall be construed, regulated, enforced and administered in accordance with the internal laws of the State of Maryland applicable to contracts made and to be performed within the State of Maryland." Trust Plans, Art. VIII, Sec. 8.2. Also, the place of business of the Trust Fund is in Baltimore, Maryland. Trust Plans, Art. VIII, Sec. 8.3. ERISA supports this Court's conclusion that this suit may be brought against these Defendants in this Court:

> (2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district *where the plan is administered*, where the breach took place, *or where a defendant resides or may be found*, and process may be served in any other district where a defendant resides or may be found.

29 U.S.C. § 1132(e)(2) (emphasis added). Defendants' final argument, lack of service of the complaint, is considered waived because of the agreement to go forward on the merits of the action.

No evidence was presented, or argument advanced, that the Defendants, who have acted as trustees up to this point in time, have failed to act competently or other than in the best interest of the beneficiaries of the Trust. Indeed, this Court recognizes that its decision heralds the replacement of a group of experienced fiduciaries with a group lacking in that experience. Nonetheless, the result reflects the fallout of the action of the established democratic process within the organization.

Plaintiff Licensed Division's request for a judgment declaring that Defendants are no longer the Association Trustees of the MEBA Trusts will be granted. Gordon Ward, Joel Bem, Alexander Shandrowsky, Mark Austin,

Nicholas Hadju, William Langley, and Steven Smith as an alternate are deemed to have been duly appointed and have full authority to act as Association Trustees.

A separate order will be entered.

/s/ William M. Nickerson
WILLIAM M. NICKERSON
United States District Judge

Dated: February 8, 1991.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WN-91-310

LICENSED DIVISION DISTRICT NO. 1-MEBA/NMU, AFL-CIO

v.

CLAYTON E. DEFRIES, *et al.*

ORDER

In accordance with the foregoing Memorandum and for the reasons stated therein, IT IS this 8th day of February, 1991, by the United States District Court for the District of Maryland, ORDERED:

1. That Defendants DeFries, Dodson, Daulley, Schamann, Landgrebe, and Masingo are declared as no longer the Association Trustees of the MEBA Trusts;

2. That Gordon Ward, Joel Bem, Alexander Shandrowsky, Mark Austin, Nicholas Hadju, William Langley, and Steven Smith are declared to have been duly appointed and to have full authority to act as the Association Trustees;

3. That Plaintiff's Motion for Temporary Restraining Order is MOOT;

4. That Defendants' Motion for Sanctions is DENIED;

5. That the Clerk of the Court shall enter this case as CLOSED on the docket;

6. That the Clerk of the Court shall mail copies of the foregoing Memorandum and this Order to all counsel of record.

/s/ William M. Nickerson
WILLIAM M. NICKERSON
United States District Judge

APPENDIX D

PLAINTIFF'S EXHIBIT 7

AMENDMENT NO. 90-1
TO THE
AGREEMENT AND DECLARATION OF TRUST
ESTABLISHING THE MEBA PENSION PLAN

1. The following amendment is proposed as a replacement for existing Section 4.4 of the MEBA Pension Plan Trust. The amendment is designed to grant discretionary authority to the Trustees with respect to plan interpretation and benefit determinations in accordance with the Supreme Court's 1989 decision in *Firestone Tire & Rubber Co. v. Bruch.*

A. *Existing Section 4.4:*

4.4 *Coverage and Eligibility.* The Trustees, by majority vote, shall have full authority to determine all questions of coverage and eligibility to participate in and receive the benefits of the Plan and shall have the power to construe and [sic] provisions of this Agreement and the terms used herein. Any such questions so determined or any construction so adopted by the majority of the Trustees shall be binding upon all parties and persons concerned.

B. *Proposed Action: Delete existing Section 4.4 and insert the following provision*:

4.4 *Interpretation.* The Trustees shall have complete authority, in their sole and absolute discretion, to (i) interpret the terms of the Trust, the Plan, any insurance contracts or policies (and any related documents and underlying policies) and (ii) determine eligibility for, and the amount, benefits under the Plan. All such interpretations and determinations of the Trustees shall be final and binding upon all parties and persons affected thereby.